RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* THE CIVIL JURY PROJECT AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF NEITHER SIDE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Civil Jury Project at New York University School of Law is a nonprofit, academic institution dedicated to studying civil jury trials in the United States.[1] It sponsors and conducts empirical studies, serves as a clearinghouse for information, and develops educational and advocacy programs on the topic. The Project's network currently consists of 224 federal and state judges, 63 professors, and 37 jury consultants, who serve as advisors. These advisors do not necessarily agree with the positions taken by the Project specifically in this brief or elsewhere.

Although the Civil Jury Project does not take a position on the constitutionality of the *inter partes* proceedings at issue here, it believes that the case raises important Seventh Amendment issues concerning legislative removal of traditional causes of action from juries. We do not undertake to evaluate the facts or resolve the dispute, but instead address the Seventh Amendment implications of the issues raised by this particular area of administrative law.

INTRODUCTION

Congress passed the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, in 2011, with the purpose of overhauling the patent system. At issue in this case is the constitutionality of *inter partes*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the Civil Jury Project or its members made any monetary contribution to the preparation or submission of the brief. Letters evidencing the parties' consent to filing of amicus briefs have been filed with the clerks.

review, that law's juryless administrative procedure for reexamining granted patents. The Civil Jury Project takes no position on that specific question; instead, it offers a review of the Seventh Amendment's history and applicability to non-Article III tribunals. It encourages the Court to issue a narrow opinion, carefully circumscribed to *inter partes* review of patents. And it counsels care in extending the current jury trial exceptions or in articulating any general principle with respect to Article I tribunals.

The constitutionality of legislative proceedings such as *inter partes* review raises issues that draw back to the debates over the protection of the civil jury at the time of the Founding. It bears emphasis that the diminution of the role of the jury was a precipitating issue in colonial grievances against the Crown. Indeed, Britain's decision to expand legislatively the jurisdiction of juryless vice-admiralty courts is specifically noted in the Declaration of Independence as motivating the Revolution. The Declaration of Independence para. 14 (U.S. 1776).

Further, the Framers' initial failure to secure civil jury trials in the Constitution nearly resulted in a failure to ratify that document. *See* The Federalist No. 83, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The populace was concerned that without additional protections, the proposed federal government could easily circumvent civil juries by directing cases to nonjury forums just as the Crown had. Hesitant to trade one unrepresentative authority for another, most states insisted on an amendment protecting juries. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80. Harv. L.

Rev. 289, 295 (1966). Ultimately, the Seventh Amendment was ratified in 1791, "preserv[ing]" the right "[i]n Suits at common law." U.S. Const. amend. VII.

This Court has been clear that the amendment refers not to specific causes of action, but to those proceedings in which legal rights are ascertained and determined. *See Parsons v. Bedford*, 28 U.S. 433, 447 (1830). Moreover, the Court has repeatedly confirmed that the Seventh Amendment is not frozen in time: Its protections extend to contemporary and statutory legal rights. *See Curtis v. Loether*, 415 U.S. 189, 193 (1974) (citing *Parsons*, 28 U.S. at 446–47). These holdings are consistent with the text and purpose of the amendment. As the Court has warned, if Congress could circumvent juries merely by passing legislation redefining legal rights and directing them to juryless courts, the protection would be ineffective. *See e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

Most decisional law under the Seventh Amendment concerns proceedings in traditional Article III courts. The role of the jury is less settled in the context of Article I tribunals. The Court has confirmed that jury trials are required in administrative proceedings, but has created two major exceptions. First, the Court has held that juries are not constitutionally required if their involvement would be inconsistent with the administration of a complex statutory scheme. *See e.g.*, *Curtis*, 415 U.S. at 194. And second, the Court has recognized a Seventh Amendment exception to "public rights" congressionally designated to Article I tribunals. *See e.g.*, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450–51 (1977).

Neither of these exceptions is rooted specifically in the text or history of the amendment, and if interpreted too broadly would be an invitation to nullify a fundamental constitutional right. Congress may undoubtedly have an interest in the swift and efficient resolution of disputes attendant to administrative schemes. But allowing such congressional interest alone to be dispositive of the application of the Seventh Amendment would grant Congress—the very institution the amendment was meant to constrain—the power to escape jury oversight merely by creating an administrative body of obvious expertise.

Similarly, the "public rights" exception is alien to the Seventh Amendment. That exception is founded in principles of sovereign immunity and has historically been relied upon to determine the boundaries of Article III jurisdiction. *See e.g.*, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855). The Court extended the exception to the Seventh Amendment for the first time in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), but has never offered evidence of a common law practice that determined the use of a jury trial on the basis of the "public" or "private" nature of the legal right asserted. Likewise, no scholar has identified such a practice. *See* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in a Dysfunctional Constitutional Theory*, 4 Wm. & Mary Bill Rts. J. 407, 430 (1995) ("No one, to our knowledge, has ever suggested [such a distinction at common law.]").

Because the matter before the Court may raise questions about the scope of the Seventh Amendment in the unresolved areas of administrative tribunals addressing public law matters, Amicus submits this

brief addressing the Seventh Amendment's history and animating purpose and urges the Court to avoid a broad ruling on the subject in this case.

ARGUMENT

I. THE FRAMERS CONSIDERED GRANTING THE LEGISLATURE POWER OVER JURY AUTHORITY AND REJECTED IT.

The Framers chose to constitutionally secure the right to a civil jury in order to constrain the federal government. The colonial experience had taught that juries could be easily circumvented by redirecting disputes to juryless tribunals. *See* The Declaration of Independence para. 14. Concerned that the proposed federal government might behave similarly, many States accompanied their ratifications of the Constitution with an insistence on a promise of a future amendment guaranteeing the right to trial by jury in civil disputes. *See* Henderson, *supra*, at 295 (reviewing the Anti-Federalists' arguments against ratification). After vigorous and public debate, the Constitution was adopted and the Seventh Amendment ratified. The Framers considered leaving the civil jury's fate in legislative hands, and affirmatively rejected it.

The importance that Framers placed on jury trial rights is unsurprising. Under British rule, the jury proved a powerful channel for colonists to exercise local and democratic control against the distant and unrepresentative Crown. The Founders thus viewed the jury as not merely a judicial institution, but as a centerpiece in the securing of political freedoms against governmental overreach. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 653–56 (1972) (recounting the jury's political significance at the

nation's Founding). As set forth by William Blackstone, the jury was "[t]he principle bulwark of our liberties," "a privilege of the highest and most beneficial nature," and "the glory of English law." 3 William Blackstone, *Commentaries on the Laws of England* *349–*50 (1768). Thomas Jefferson did not mince words when he later declared: "I consider Trial by Jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

Perhaps the most famous example of the colonists exerting political power through the jury is the seditious libel case of John Peter Zenger in 1735. Although that was a criminal case, it should be remembered that one of the articles for which Zenger was prosecuted was a denunciation of the New York governor's attempt to recover a debt in an equity court so as to evade the debtor's right to a jury trial in the common-law courts. *See* Wolfram, *supra*, at 655. At trial, because all agreed that Zenger was responsible for the publications, his attorney Andrew Hamilton argued vigorously in support of the jury's power to determine both law and fact. Although the judge threatened Hamilton with disbarment and the jurors with perjury if they returned a not guilty verdict, the jury persisted and acquitted Zenger of all charges.[2]

The Zenger trial quickly proved to be no outlier. By the 1760s, colonists were regularly using the civil jury both defensively and offensively to challenge the Crown. Defensively, colonial juries would often refuse to enforce civil penalties against smugglers who

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[2] For an in-depth review of the John Peter Zenger trial, see generally James Alexander, *A Brief Narration of the Case and Trial of John Peter Zenger* (1963).

evaded payment of taxes and tariffs. And offensively, often those same smugglers would subject officers to private lawsuits for damages attendant to searches.[3] As a Massachusetts governor at the time complained, "a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers." Stephen Botein, *Early American Law and Society* 57 (1983) (quoting Governor William Shirley).

The Crown responded by legislatively expanding the jurisdiction of juryless tribunals beginning with the Stamp Act of 1765. That law required all printed documents used or created in the colonies to bear an embossed revenue stamp, with violations to be tried in juryless vice-admiralty courts. In the next three years, the British passed a series of taxes known as the Townshend Acts, which again placed jurisdiction beyond juries in vice-admiralty courts.

Colonists viewed these usurpations of jury authority as tyrannical. The Stamp Act provoked the First Congress of the American Colonies in October of 1765, where the body declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies," and that "[the Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists." Resolutions of the Stamp Act Congress (1765), *reprinted in Sources of Our Liberties* 270–71 (R. Perry & J. Cooper eds. 1959). So critical did the colonists view this grievance, that it reappeared in the Declaration of Independence a decade later, which

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[3] Famously in *Erving v. Cradock*, Quincy 553 (Mass. 1761), a civil jury awarded large damages against a customs officer who seized the plaintiff's ship pursuant to a writ of assistance, despite the plaintiff's admission that he was liable for forfeiture.

specifically accused the Crown of "depriving [the colonists] in many cases, of the benefits of trial by jury." The Declaration of Independence para. 14.

At the time of the Revolution, all thirteen states protected the institution of the jury, either by express provisions in their constitutions, by statute, or by continuation of the practices that had applied prior to Independence. *See* Wolfram, *supra*, at 655. Even the weak central government of the Articles of Confederation prescribed the use of civil juries in prize cases that were triable to the only central judicial authority created under that instrument. *Id.* (citing Articles of Confederation, art. IX). In light of this history, the failure to secure jury trial rights in the original constitutional design was an immediate source of contention in the debates over ratification. *Id.* at 658–61.

Opposition to the absence of secured civil jury trials was fierce. Anti-Federalists quickly took offense at Article III's granting the Supreme Court appellate jurisdiction "both as to law and fact," which they contended effectively abolished civil juries altogether. *See e.g.*, Herbert J. Storing, *What the Anti-Federalists Were For* 64 (1981). And they wrote at length on the parade of horribles if the document were ratified without additional jury protections.[4] As Alexander Hamilton acknowledged, "The objection to the [Constitution], which has met with most success[,] . . . is that relative

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[4] "We know that the trial by a jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed . . . ." Debates of the North Carolina Constitutional Convention, *reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* 523 (Neil H. Cogan ed., 1997).

to the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83, at 494.

With ratification far from certain, Hamilton set out to persuade the public that there was no need to guarantee the right to trial by jury. In Federalist 83, he stressed the difference between silence and abolition, contending that the proposed Constitution was not eradicating civil jury trials, but rather leaving their continuation to congressional wisdom. *Id.* at 494. He defended the omission, explaining:

> First, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.

Id. at 502. Under the original Constitution, the political process would determine the fate of civil juries.

Hamilton and the other Federalists failed to convince the American people. As Justice Rehnquist recounted the history, "[the Anti-Federalists'] pleas struck a responsive chord in the populace, and the price exacted in many States for approval of the Constitution was the appending of a list of recommended amendments, chief among them a clause securing the right of jury trial in civil cases." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting). Indeed, five of the required

nine states insisted on adding civil jury protections.[5] It was clear that the jury right would need to be constitutionalized, which is precisely what happened in 1791. *See* U.S. Const. amend. VII.

"The Framers put a jury-trial guarantee in the Constitution," noted Justice Scalia for the Court, "[because] they were unwilling to trust government to mark out the role of the jury." *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (noted in the criminal context). This case concerns Congress's claim of authority to direct disputes over patent validity to a nonjury administrative forum. This move is out of step with the history and spirit of jury protection established at the Founding, and should give pause.

II. THE SEVENTH AMENDMENT'S REACH IS NOT LIMITED TO ARTICLE III COURTS.

The Court has long interpreted the Seventh Amendment's strictures without an overly formalist focus on the forum in which a claim is brought. *See e.g.*, *Granfinanciera*, 492 U.S. at 52 (extending the right to certain bankruptcy proceedings); *Ross*, 396 U.S. at 538 (to legal questions raised in certain historically equitable claims); *Parsons*, 28 U.S. at 447 (noting the right may extend to all suits not of equity and admiralty jurisdiction, "whatever may be the peculiar form which they may assume to settle legal rights"). This flexibility includes application to Article I administrative tribunals. *See e.g.*, *Curtis*, 415 U.S. at 194. In that context, however, two carveouts have been recognized: a functionalist exception, and a "public rights"

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[5] States that insisted on a civil jury trial amendment included Massachusetts, New Hampshire, Virginia, New York, and Rhode Island. *See* Henderson, *supra*, at 298.

exception. Neither of these deviations finds support in the amendment's history or text, and if interpreted too broadly would empower Congress to sidestep civil juries altogether.

It was not always clear that the Seventh Amendment applied to modern administrative proceedings. In *NLRB v. Jones & Laughlin Steel Corp.*, this Court held that the National Labor Relations Board's authority to decide whether an employer had committed an unfair labor practice under the statute and to order reinstatement and backpay was Constitutional because "[t]he *proceeding* [was] one unknown to the common law[:] It [was] a statutory *proceeding*." 301 U.S. 1, 48 (1937) (emphasis added). The Court highlighted that the relief of backpay was merely incidental to the primary relief of reinstatement, which was a form of equitable relief not entitled to jury protection. *Id.*[6] Accordingly, the Court left open whether it was the nature of the tribunal or the nature of the relief sought that exempted this form of administrative action from the need for a jury.

The Court later clarified the Seventh Amendment's application in Article I tribunals. In *Curtis v. Loether*, the Court interpreted *Jones & Laughlin* as "merely stand[ing] for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with [the agency's] role in the statutory scheme." *Curtis*, 415 U.S. at 194 (footnote omitted). The Court confirmed Congress's

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[6] At the time, equity courts were permitted to resolve incidental legal issues without contravening the Seventh Amendment. *See* A. Leo Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. Pa. L. Rev. 320 (1951).

power "to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment" but crafted this congressional authority to be limited. *Id.* at 195. So long as their inclusion does not "'go far to dismantle [a] statutory scheme,'" juries are required even in Article I tribunals. *See Granfinanciera*, 492 U.S. at 61 (quoting *Atlas Roofing*, 430 U.S. at 454 n. 11).

While extending the Seventh Amendment's protection beyond Article III courts conforms with the text and history of the amendment, application of the *Curtis* functionalist carveout has proved difficult. One reason is that "the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration." *Parklane Hosiery*, 439 U.S. at 343 (Rehnquist, J., dissenting). And surely Congress—the political institution that the Seventh Amendment chiefly constrains—could not derogate the protection simply by creating a statutory scheme and committing resolution to an efficient administrative body. "[T]o hold otherwise," as this Court warned in *Granfinanciera S.A. v. Nordberg*, "would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common law forebears." 492 U.S. at 52.

The "public rights" exception added to Seventh Amendment jurisprudence just three years after *Curtis* compounds the confusion. In *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*,

430 U.S. 442 (1977), the Court addressed a challenge to a law authorizing federal administrators to inspect private workplaces and to impose civil penalties for violations of federally established health and safety standards. Instead of focusing on how juries would impede the swift resolution of safety violations, the Court introduced "public rights" as an exception. *Id.* at 450. The Court concluded that there is no jury trial right in administrative "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." *Id.*

Prior to *Atlas Roofing*, the public rights exception had never been applied in the context of the Seventh Amendment. Instead, the concept had emerged as an exception to Article III's Vesting Clause. *See e.g.*, *Murray's Lessee*, 59 U.S. at 272. The rationale was that if Congress could conclusively determine a matter within its own discretion, it could assign adjudication of that matter to tribunals it creates without judicial oversight.

But this conclusion as to Article III jurisdiction does not decide the Seventh Amendment issue, as the two provisions are not coterminous. No precedent cited in *Atlas Roofing* supported the proposition that the Seventh Amendment did not apply based on the public or private character of the legal right. And no jurist or scholar has elsewhere identified evidence suggesting such a distinction at common law. *See* Redish & Daniel J. La Fave, *supra*, at 430. To the contrary, this Court has acknowledged, at least in the Article III context, that the public rights "exception has been the subject of some debate," and expressed skepticism over recognizing "amorphous 'public right[s].'" *See Stern v. Marshall*, 564 U.S. 462, 488, 495 (2011).

Despite these problems, the Court has expanded the Seventh Amendment's public rights exception. While for a time the carveout only applied to cases in which the Government sued in its sovereign capacity, it was extended to some cases between private parties in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). There, the Court concluded that a "seemingly 'private' right" created by Congress may be "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 594. "To hold otherwise," the Court explained, "would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures . . . with respect to rights created by a regulatory scheme." *Id.*

Thomas tees up the question in the current case. That is, to what extent may Congress convert traditional private legal rights—in this instance, an issued patent—into a public right through the creation of a complex administrative scheme. Congress may well need to avoid the inefficiencies of Article III adjudication, but that need should not in itself be dispositive of all Seventh Amendment concerns. The Court has already been clear that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity." *Granfinanciera*, 492 U.S. at 61. It has never held that the jury trial right is entirely inapplicable outside of Article III. A decision altering these basic principles would be contrary to the Seventh Amendment's text and would compromise the animating purpose of the constitutional right.

CONCLUSION

The Civil Jury Project takes no position on the constitutionality of *inter partes* proceedings. In making that determination, however, history counsels against a broad ruling on the applicability of the Seventh Amendment to administrative tribunals. Instead, Amicus urges the Court to avoid applying either the functional or public exceptions in this case, and to limit resolution to this specific area of administrative law.

Respectfully submitted,

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